



POLICE DEPARTMENT

-----X
In the Matter of the Disciplinary Proceedings :

- against - : FINAL

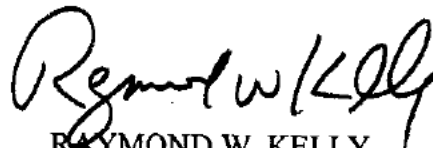
Detective Brian Cunningham : ORDER

Tax Registry No. 896312 : OF

Narcotics Borough Bronx : DISMISSAL
-----X

Police Officer Brian Cunningham, Tax Registry No. 896312, Shield No. 5602, Social Security No. ending in [REDACTED] having been served with written notice, has been tried on written Charges and Specifications numbered 83905/08 as set forth on form P.D. 468-121, dated February 27, 2008, and after a review of the entire record, has been found Guilty as Charged.

Now therefore, pursuant to the powers vested in me by Section 14-115 of the Administrative Code of the City of New York, I hereby DISMISS Detective Brian Cunningham from the Police Service of the City of New York.


RAYMOND W. KELLY
POLICE COMMISSIONER

EFFECTIVE: 0001 Hours, FEBRUARY 4, 2009

COURTESY • PROFESSIONALISM • RESPECT



POLICE DEPARTMENT

December 18, 2008

-----X
In the Matter of the Charges and Specifications

: Case No. 83905/08

- against -

Detective Brian Cunningham

Tax Registry No. 896312

Narcotics Borough Bronx
-----X

At: Police Headquarters
One Police Plaza
New York, New York 10038

Before: Honorable Robert W. Vinal
Assistant Deputy Commissioner - Trials

A P P E A R A N C E:

For the Department: Krishna O'Neal, Esq.
Department Advocate's Office
One Police Plaza
New York, New York 10038

For the Respondent: James Moschella, Esq.
225 Broadway, 32nd Floor
New York, NY 10007

To:

HONORABLE RAYMOND W. KELLY
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

COURTESY • PROFESSIONALISM • RESPECT

The above-named member of the Department appeared before me on July 22, 2008 and September 30, 2008, charged with the following:

1. Said Detective Brian Cunningham, assigned to Narcotics Borough Bronx, on or about and between November 7, 2007 through February 7, 2008, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department in that said Police Officer did wrongfully ingest cocaine without police necessity or authority to do so.

P.G. 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCT

2. Said Detective Brian Cunningham, assigned to Narcotics Borough Bronx, on or about and between November 7, 2007 through February 7, 2008, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department in that said Police Officer did wrongfully possess cocaine without police necessity or authority to do so.

P.G. 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCT

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charges and a stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Guilty as charged.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Police Officer Sayedul Rahman, Sergeants Richard Kloos and Michael Rothenbucher, and Dr. Thomas Cairns as witnesses.

Police Officer Sayedul Rahman

Police Officer Rahman, testified that he has been assigned to the Medical Division's Drug Screening Unit for the past three years collecting urine and hair samples from members who have been ordered to report to the Medical Division for random drug screening. Upon being assigned to the Medical Division, he received training from supervisors and from the Psychomedics Corporation ("Psychomedics"), a laboratory which has contracted with the Department to perform drug testing, regarding how to properly collect and seal hair samples for drug testing. Rahman testified that each day the Medical Division receives a list produced by a computer at MISD of members who are to be ordered to report to the Medical Division for random drug screening. A Police Administrative Aide assigned to the Medical Division notifies the commands of the members on the list and they are ordered to immediately report to the Medical Division's Drug Screening Unit.

Rahman testified that he collected hair samples from the Respondent on February 7, 2008. After the Respondent appeared at the Medical Division's Drug Screening Unit and entered his name in the sign-in log, Rahman, following mandated hair sample collection documentation procedures, examined the Respondent's Department ID to insure that the photo on the ID was the face of the person before him. He then assigned to the Respondent the drug screening number 4-59-08-XNH. This number was entered along with the Respondent's name, shield number, tax number and social security number on a "Drug Screening Questionnaire – Hair Testing" form which the Respondent filled in [Department's Exhibit (DX) 1] (Item "1." on this form reads: "List any prescription medication taken during the past 3 months." The Respondent entered:

“[REDACTED]”) The Respondent signed and dated the form and Rahman signed it as the “collector.” The Respondent’s right index finger was inked and his fingerprint was entered on this form.

The Respondent’s assigned drug screening number was also entered on two forms entitled “Psychemedics Forensic Drug Test Custody and Control Form – Initial Testing.” These identical forms contained pre-printed “Specimen ID” numbers. On one form the Specimen ID number was J523109 (DX 2A), and on the other form the Specimen ID number was J543108 (DX 2B). Rahman entered on each of these forms that the hair samples were to be removed from the Respondent’s leg, at his request. The Respondent signed and dated each of these forms under the “Donor Certification” statement and Rahman dated and signed both forms as the “Collector.”

Rahman then proceeded to follow the mandated hair sample collection procedures he always follows by cleaning the sample collection table with alcohol and water to sterilize it and by putting “medical paper” on top of the table. He then used sample collection packaging materials provided by Psychemedics. He set-up on the table three strips of tin foil and three collection envelopes and three sample labels all of which he removed from a standard sealed kit provided by Psychemedics. Rahman put on sterile gloves and removed a scissor from a sealed package provided by Psychemedics. Rahman testified that he asked the Respondent where on his body he wanted the hair to be removed. The Respondent told him to take it from his legs. Rahman testified that he cut hair from the Respondent’s legs and separated the hair into three piles. Each pile was placed into one of the three strips of tin foil and each strip of tin foil was folded and placed into one of the three sample collection envelopes which were each sealed.

Rahman also prepared a "Sample Acquisition Card" (DX 4) denoting the Respondent's drug screening number 4-59-08-XNH. The hair samples were placed into a pouch which he then sealed in front of the Respondent. He told the Respondent to write his initials on the "integrity seal" tape next to the words "sealed specimen" on the line next to the words "Test Subject Initials." Rahman testified that he made an entry in the "Hair Refrigerator Log," next to line 41 (DX 3), indicating that hair samples assigned drug screening number 4-59-08-XNH (the Respondent's hair samples) were placed inside a safe box at the Medical Division at 1730 hours on February 7, 2008. They were later transferred to the Sick Desk which is where a courier from DHL picks them up and transports them to Psychemedics.

On cross-examination, Rahman confirmed that because he has performed about 3,000 sample collections at the Medical Division, his testimony regarding how he prepared the collection table and how he collected the Respondent's hair samples are based on the fact that he always follows the same mandated table sterilization and hair sample collection procedures and based on his past recollection as recorded on the documents that he was shown (and that were placed in evidence) during his direct examination. He was asked whether he was supposed to note the Respondent's physical and mental condition on the "Drug Screening Questionnaire – Hair Testing" form. He answered in the negative.

Sergeant Richard Kloos

Sergeant Kloos, who is assigned to the Medical Division's Sick Desk, testified that he signed the Medical Division's "Record of Transmittal Hair Sample" log (DX 5)

which shows that sealed pouches of hair samples assigned drug screening numbers which included number 4-59-08-XNH were placed inside a safe inside the Sick Desk office at the Medical Division on February 7, 2008 at 2220 hours and that these samples were "removed to lab" by courier on February 8, 2008 at 1715 hours.

On cross-examination, Kloos was asked why hair samples were brought to the Sick Desk for storage rather than being shipped to Psychomedics directly from the office where they were collected. Kloos explained that when the hair sample collection office closes for the day at midnight, no Medical Division personnel are present inside the collection office until the next morning. Rather than leave samples overnight inside an unattended office, the samples are brought to the Sick Desk because the Sick Desk is supervised 24 hours a day. The samples are placed inside a locked cabinet at the Sick Desk. Only the Sick Desk Supervisor on duty has a key to this cabinet. The delivery service used by the Department, DHL, arrives sometime between 4:00 p.m. and midnight to pick up and transport samples to Psychomedics. Since sample collection is performed between 4:00 p.m. and midnight, if the DHL courier arrives before all sample collection taking place on that day has been completed, samples collected after the DHL courier leaves remain inside the locked cabinet at the Sick Desk until the next day.

Sergeant Michael Rothenbucher

Sergeant Rothenbucher, assigned to IAB Group 41, testified that after Psychomedics notified the Department that the Respondent's hair samples had tested positive for cocaine, an official Department interview of the Respondent was scheduled. The Respondent was instructed to bring any prescriptions he had been issued by

physicians to his official Department interview which was conducted on April 3, 2008. The Respondent told Rothenbucher that he had forgotten to include Flexeril on the "Drug Screening Questionnaire – Hair Testing" form (DX 1) under item 1. which states: "List any prescription medication taken during the past 3 months." The Respondent also told him that he had received medical treatment at [REDACTED] Center in [REDACTED] New York, and that he had filled prescriptions issued to him by physicians at the Jefferson Valley Pharmacy, [REDACTED], New York.

Rothenbucher requested that the Respondent sign a release of personal medical information authorization. The Respondent did so and Rothenbucher was able to obtain the Respondent's medical records from [REDACTED] Center (DX 6) [These records show that while he was at his hospital, the Respondent was prescribed [REDACTED], [REDACTED], [REDACTED] and [REDACTED]]. Rothenbucher also obtained a printout from the Jefferson Valley Pharmacy of all prescriptions presented by the Respondent at the Jefferson Valley Pharmacy (DX 7) [These records show that the Respondent was prescribed S [REDACTED], [REDACTED] and [REDACTED]].

Rothenbucher testified that all pharmacies in New York State are required to report to the New York State Department of Health's Bureau of Narcotic Enforcement (BNE) each time they fill a prescription for a controlled substance. He contacted BNE and requested to be provided with a list of all controlled substances prescribed to the Respondent during the period January 1, 2001 through February 7, 2008 (DX8). He received a letter, dated May 15, 2008, from BNE Senior Investigator Kenneth Post (DX 8) [The letter states that BNE records show that the Respondent had presented no

prescriptions for controlled substances at any pharmacy in New York State during that period of time.]

On cross-examination, Rothenbucher acknowledged that he did not contact or go to the offices of the Respondent's personal physicians, Dr. Spadacini and Dr. Michai, to obtain their records regarding their treatment of the Respondent, and he acknowledged that he did not attempt to obtain the Respondent's dental records from his dentists, Dr. Levine and Dr. Hirsch.

Dr. Thomas Cairns

Dr. Cairns, who is presently the Senior Scientific Advisor for Psychomedics and is the former Scientific Director for Psychomedics, was stipulated to be an expert in the area of testing hair for drug content based on the qualifications listed on his curriculum vitae (DX 9). Cairns explained that when cocaine is ingested into the body, it enters the blood stream. As cocaine-contaminated blood enters the base of a strand of hair, some of the cocaine lodges in that part of the hair strand closest to the skin. Since body hair grows at a predictable rate, hair acts as a "tape recorder" marking the point in time when the cocaine was ingested. Cairns also testified that when cocaine is ingested into the body and passes through the liver, it is metabolized resulting in the production of the cocaine metabolite benzoylecgonine (BE). Cairns further testified that when cocaine and alcohol are consumed together, they chemically combine to form the "unique metabolite" cocaethylene (CE).

Cairns testified that for reporting purposes, Psychomedics has adopted the U.S. Food and Drug Administration's recommended "administrative cut-off level" of five

nanograms of cocaine per ten milligrams of hair. The purpose of this administrative cut-off level is to provide a margin of testing error which insures that a false positive result will not be reported as a positive result. Thus, if a hair sample tests positive for cocaine but the concentration of cocaine detected in the sample is below five nanograms of cocaine per ten milligrams of hair, Psychemedics does not report a positive result for cocaine.

Cairns interpreted the data contained in the laboratory data package produced by Psychemedics which details the receipt, chain of custody, testing procedures and results of the testing of the Respondent's two hair samples (DX 10). The laboratory data package documents that the Respondent's two hair samples were both received at Psychemedics "with chain of custody intact" (DX 10 p. 4 and 5). Cairns testified that employees are trained to examine the seals on sample containers to confirm that they are intact and that the sample containers had not been opened or tampered with after the sample containers were sealed. One sample was assigned internal laboratory accession number (LAN) 115606772, and the other sample was assigned LAN 410019119.

The analytical results show that a portion of sample LAN 115606772 was initially tested via the Radioimmunoassay (RIA) screening test (DX 10 p. 3) and that this sample screened positive for cocaine when subjected to the screening test. As a result, following laboratory protocol, both of the Respondent's hair samples were then separately tested via Liquid Chromatography/Mass Spectrometry/Mass Spectrometry (LC/MS/MS) instrumentation. Cairns described LC/MS/MS as the "gold standard" for hair testing.

The LC/MS/MS test results showed that both samples tested positive for cocaine at a concentration level well above the reporting cut-off level of five nanograms of

cocaine per ten milligrams of hair. Sample LAN 115606772 tested positive at 37.4 nanograms of cocaine per ten milligrams of hair and Sample LAN 410019119 tested positive at 40.7 nanograms of cocaine per ten milligrams of hair (DX 10 p. 3).

Cairns also testified that the LC/MS/MS analytical results show that both of the Respondent's hair samples also tested positive for the presence of CE. Sample LAN 115606772 tested positive for CE at 9.2 nanograms of CE per ten milligrams of hair and Sample LAN 410019119 also tested positive for CE at 11.8 nanograms of CE per ten milligrams of hair (DX 10 p. 3). Cairns testified that these CE results show that the Respondent consumed alcohol and cocaine together.

Cairns further testified that the LC/MS/MS analytical results show that both of the Respondent's hair samples also tested positive for the presence of BE. Sample LAN 115606772 tested positive for BE at 6.3 nanograms of BE per ten milligrams of hair and Sample LAN 410019119 also tested positive for BE at 6.6 nanograms of BE per ten milligrams of hair (DX 10 p. 3). Cairns testified that these results show that the Respondent consumed cocaine because BE can only be produced when cocaine is metabolized by the liver.

Cairns also testified that these results show that the Respondent must have consumed cocaine between November 7, 2007 and February 7, 2008, because, based on body hair growth rates, the Respondent's hair samples reflected cocaine ingestion that occurred within six to seven months prior to the date his hair samples were collected.

Cairns testified that even if the Respondent's hair samples had been externally contaminated with cocaine the Respondent had come into contact while performing his duties, this would not result in the hair samples testing positive for cocaine because

Psychemedics subjects each hair sample to be tested via the LC/MS/MS test to five "aggressive" hair washes, and uses a wash criterion to evaluate the effectiveness of the final wash, before a hair sample is tested by the LC/MS/MS test.

Cairns further testified that he reviewed the Respondent's medical records from [REDACTED] Center (DX 6) which show that the Respondent was prescribed [REDACTED]. Cairns also reviewed the printout of prescriptions presented by the Respondent at the Jefferson Valley Pharmacy (DX 7) which show that the Respondent was prescribed [REDACTED]. Cairns testified that these medications were antibiotics, painkillers and muscle relaxants.

When he was asked if ingestion of any of these medications would cause the Respondent's hair samples to test positive for cocaine, he answered, "Absolutely not." Cairns explained that since each of these medications has a different chemical structure from cocaine, and since the LC/MS/MS test identifies the "unambiguous chemical structure" of the sample being tested, there was "no way" that the LC/MS/MS test would identify any of these medications as cocaine. Cairns noted that cocaine is not an opiate but that [REDACTED] and [REDACTED] are opiates and would be identified as such by the LC/MS/MS test if they were present in a hair sample that was analyzed by the LC/MS/MS test.

Cairns further testified that the level of cocaine detected in both of the Respondent's hair samples constituted a concentration level well above the reporting cut-off level. Cairns opined that these cocaine concentration levels detected in the two hair samples were indicative of "multiple ingestions of cocaine" by the Respondent.

On cross-examination, Cairns confirmed that during 2005 the Respondent was prescribed a non-cocaine controlled substance and that even though this occurred during the period from January 1, 2001 through February 7, 2008, it was not reported in the letter BNE Senior Investigator Post sent to Kloos (DX 8). Cairns explained that because this controlled substance was prescribed for the Respondent while he was in the hospital, it was not reported to NYSDOH because the prescription was not presented at a pharmacy. Cairns testified that he had reviewed the Respondent's dental records which show that he was treated with lytocaine, for topical anesthesia. Cairns testified that lytocaine does not have the same chemical structure as cocaine.

Cairns was asked whether in any of the other cases where he has testified against a member of the service who tested positive for drug use he had seen a medical history regarding hospitalizations and prescriptions as extensive as the Respondent's. He responded in the negative and stated that to see a member with such an extensive medical history was unusual.

Cairns was confronted with the fact that six days prior to the collection of his hair samples (on February 7, 2008), the Respondent was prescribed xylocaine. Cairns testified that xylocaine also has a different chemical structure than cocaine and that its presence in a hair sample would not result in a false positive LC/MS/MS test result for cocaine.

Cairns was also confronted with the fact that three months prior to the collection of his hair samples, the Respondent was required by the Department to produce a urine sample and that this sample tested negative for cocaine and other controlled substances. Cairns testified that because all traces of cocaine are flushed out of the urinary tract 72

hours after cocaine is consumed, urine testing can only detect cocaine consumed within three days of the date that the urine was sampled. Thus, Cairns opined, this negative result only shows that the Respondent did not consume any cocaine within the 72 hour period immediately prior to the collection of his urine sample. Cairns testified that hair testing detects historical drug use but it will not detect drug ingestion occurring within three days of the date that the hair was sampled because three days of hair growth cannot be sampled even if the collector clips hair very close to the skin.

When Respondent's attorney asked Cairns whether they had ever met previously, Cairns responded, "We have jousting before." Cairns acknowledged that he did not personally open the delivery envelope containing the Respondent's hair samples when it arrived at Psychemedics, he did not personally check the seals on the sample containers, or handle the samples or make any entries in Psychemedics' internal chain of custody documentation contained in the laboratory data package produced by Psychemedics (DX 10) or speak to the Psychemedics employees who performed these tasks. Nor did he perform any of the five hair washes or any of the testing procedures regarding the Respondent's two hair samples or speak to the Psychemedics employees who actually performed these tests. When he was asked if he would be able to identify the face of the person who signed the chain of custody documentation, he responded in the negative. He explained that he was familiar with the training and supervision of Psychemedics' employees and the rigorous, mandated testing processes and protocols that Psychemedics follows and that is the reason why he has confidence in the accuracy of the testing results produced by Psychemedics whose 20 employees, who work eight hour shifts, conduct about 3,000 tests on samples daily.

The Respondent's Case

The Respondent called Detectives Thomas Guarino and Thomas McHale as witnesses and the Respondent testified in his own behalf.

Detective Thomas Guarino

Detective Guarino, who is assigned to Narcotics Borough Bronx as an investigator, testified that he has known the Respondent for three years and that he worked with the Respondent on a daily basis for one year as his partner performing "buy and bust" operations and "large scale narcotic operations." He started working with the Respondent in early 2007 and continued working with him until the Respondent was suspended in February, 2008. He has socialized with the Respondent and his family. He has never observed the Respondent exhibit any behavior consistent with cocaine use. He testified that the Respondent has a reputation among his peers as a leader and as "a very honest professional detective."

Detective Thomas McHale

Detective McHale, who has been assigned to Narcotics Borough Bronx for the past four years and who has known the Respondent for four years, testified that he worked with the Respondent on a daily basis for over a year performing "buy and bust" operations. He has also socialized with the Respondent while they were off duty. He has never witnessed the Respondent engage in any behavior that would indicate that he uses

cocaine. He testified that the Respondent has a reputation among his peers for "integrity," and as being "always professional" and "always honest and truthful."

The Respondent

The Respondent, an 18-year member of the service who has never previously been the subject of Charges and Specifications, testified that he is married and has six children, all of whom are under the age of 13. He testified that he has served as a volunteer in his community.

Prior to being suspended regarding the subject charges, he was assigned to the Organized Crime Control Bureau and served in Narcotics Borough Bronx for 12 years. The Respondent recalled that during "buy and bust" operations he was frequently assigned to conduct field testing of suspected narcotics to determine if substances purchased by undercover officers were controlled substances. The team he was assigned to was regularly involved in purchasing large amounts of cocaine. In one such operation, the Respondent personally handled one kilo of cocaine. The Respondent testified that he and the other members of his team "took animals off the street."

The Respondent vehemently denied that he has ever knowingly ingested cocaine. He testified that although he has "done crazy things in my life," he has never consumed cocaine by directly snorting, smoking, injecting or swallowing cocaine. He testified that he had no explanation for why his hair samples had tested positive for the presence of cocaine and because of this, "I can't prove my innocence." He testified that "the only thing I can think of" is that "cocaine is in my system" as a result of "pain relievers" he has been prescribed by physicians on several occasions because of his medical problems,

or because "maybe I ingested something" at ground zero right after September 11, 2001, when he was assigned there for four consecutive days. He was then assigned to work at the Staten Island landfill for a year where material removed from ground zero was deposited. He testified that he was "breathing all the toxic stuff out there, another thing I don't know what I ingested." As a result, he began to suffer severe headache pain. He was hospitalized for over a week during 2002, for migraine headache pain. Because he had inhaled mercury at ground zero, he suffered chest pain, severe nasal congestion and he had trouble breathing. He was again hospitalized in 2005 for a [REDACTED] to relieve sleep apnea and constant, severe sore throats and because "they had to reconstruct my throat." He received anesthesia and other medications during these surgeries.

He began being treated by his physician, Dr. Fishman, in 2002. Dr. Fishman would spray [REDACTED] into his throat so that he could "stick a scope down my throat."

On November 13, 2007, the Respondent was ordered to submit a urine sample for drug testing. He was later informed that his urine sample had tested negative for controlled substances.

He recalled that on or about February 3, 2008, the week before he submitted his hair samples, he was treated by Dr. Fishman who soaked cotton balls in [REDACTED] and used a spray. He testified that Dr. Fishman asked him whether he needed a note to provide to the Department. When the Respondent asked Dr. Fishman why he would need a note, Dr. Fishman told him, in the presence of the Respondent's wife, that he once had "the same exact operations as you did" and "I failed this drug test and it came up positive for cocaine." The Respondent told Dr. Fishman, "If I need the note, I will contact you."

FINDINGS AND ANALYSIS

Random drug screening selection and hair sample collection procedures

The Respondent does not challenge the computer software program utilized by MISD that included his name on a list of members who were to be ordered to report to the Medical Division for random drug screening on February 7, 2008. This computer program has been found to satisfy the requirement of randomness sufficient to justify a drug testing order.¹ The Respondent also does not contest that his hair samples were properly collected, packaged and sealed, and that his hair samples were stored at the Sick Desk until they were picked up and transported to Psychomedics for testing.

Hair sample testing procedures and results

Cairns, Scientific Director for Psychomedics, was stipulated to be an expert in the field of testing hair for drug content based on the qualifications listed in his curriculum vitae (DX 9). Cairns acknowledged that he did not personally open the envelope containing the Respondent's hair samples when it arrived at Psychomedics and he did not personally check the seals on the sample containers, or handle the samples or make any entries in Psychomedics' internal chain of custody documentation contained in the laboratory data package produced by Psychomedics (DX 10), or speak to any of the Psychomedics employees who performed these tasks. Nor did he perform any of the five hair washes which eliminate any external contamination, or personally perform any of the testing procedures regarding the Respondent's two hair samples or speak to the Psychomedics employees who actually performed these tests. When he was asked if he

¹ Worrel v. Brown, 177 A.D.2d 446 (1st Dept 1991), leave to appeal denied, 79 N.Y.2d 755 (1992).

would be able to identify the face of the person who signed the chain of custody documentation, he responded in the negative.

However, Cairns testified extensively about the mandated chain of custody, sample preparation and testing procedures followed by Psychemedics employees. Moreover, the laboratory data package in evidence documents that the Respondent's two hair samples were both received at Psychemedics "with chain of custody intact" (DX 10 p. 4 and 5) and also contains internal laboratory chain of custody logs signed by Psychemedics employees when they removed samples from storage for testing. This testimony and documentation *prima facie* establishes that the seals on the sample containers, which the Respondent initialed after they were sealed in front of him by Rahman were intact when the samples arrived at Psychemedics and that they were properly handled within the lab.

Due process does not require that the Psychemedics employees and technicians who performed these tasks testify at this disciplinary hearing because testing results may be admitted and credited based on the testimony of a laboratory director where, as here, the chain of custody process is documented, the reliability of the testing procedures used has been established, the director is familiar with all the steps taken, the director is subjected to cross-examination, and no claim is raised by the Respondent that there was a specific defect in the sample receipt, sample preparation or testing procedures used.²

The Respondent here did not allege any specific defect in the chain of custody process or the pre-testing procedures utilized by Psychemedics as delineated in the laboratory data package produced by Psychemedics (DX 10). Neither did the

² Gordon v. Brown, 84 N.Y.2d 574, 579-580 (1994).

Respondent offer any specific challenge to the RIA screening test that is utilized by Psychemedics to initially analyze a hair sample for the presence of cocaine, or to the LC/MS/MS test that is utilized by Psychemedics to confirm the screening test result that is able to detect and quantify the concentration level of specific drugs and their metabolites.

Cairns testified that the testing results (DX 10 p. 3) show that after one of the Respondent's hair samples tested positive for cocaine via RIA, a scientifically recognized screening method, both of the Respondent's hair samples were separately subjected to testing utilizing the scientifically recognized LC/MS/MS method. He explained that the analytical results show that when both of the Respondent's hair samples were individually tested via LC/MS/MS instrumentation, each sample tested positive for cocaine at a concentration level well above the USFDA-recommended reporting cut-off level of five nanograms of cocaine per ten milligrams of hair. Specifically, sample LAN 115606772 tested positive at 37.4 nanograms of cocaine per ten milligrams of hair and Sample LAN 410019119 tested positive at 40.7 nanograms of cocaine per ten milligrams of hair. Thus, Sample LAN 115606772 tested positive for cocaine at a concentration level over seven times above the cut-off level, and Sample LAN 410019119 tested positive for cocaine at a concentration level more than eight times above the cut-off level.

Moreover, the LC/MS/MS analytical results also show that both of the Respondent's hair samples tested positive for the presence of CE. Sample LAN 115606772 tested positive for CE at 9.2 nanograms of CE per ten milligrams of hair and Sample LAN 410019119 also tested positive for CE at 11.8 nanograms of CE per ten

milligrams of hair. Cairns offered expert testimony that these results show that the Respondent consumed alcohol and cocaine together.

The LC/MS/MS analytical results also established that both of the Respondent's hair samples tested positive for the presence of BE. Sample LAN 115606772 tested positive for BE at 6.3 nanograms of BE per ten milligrams of hair and Sample LAN 410019119 also tested positive for BE at 6.6 nanograms of BE per ten milligrams of hair. Cairns offered expert testimony that these results show that the Respondent consumed cocaine and that it entered his system because BE can only be produced when cocaine is ingested and metabolized.

Where, as here, a recognized screening test positive result is confirmed when the same sample is subjected to LC/MS/MS analysis, such testing results have been found to constitute substantial scientific evidence of the presence of cocaine.³ Finally, Cairns testimony established that the Respondent consumed cocaine between November 7, 2007 and February 7, 2008, because, based on the growth rate of leg hair, the Respondent's samples reflected cocaine ingestion that occurred within the six to seven month period immediately prior to the date his hairs samples were collected.

Based on the above, the test results obtained by Psychemedics regarding each of the Respondent's separately tested hair samples constitute substantial evidence that the Respondent possessed and ingested cocaine between November 7, 2007 and February 7, 2008.⁴

³ McBride v. Kelly, 215 A.D.2d 161 (1st Dept 1995).

⁴ McGovern v. Safir, 266 A.D.2d 107 (1st Dept 1999).

Affirmative defense of involuntary ingestion

The Respondent raised an affirmative defense of involuntary ingestion by contending that Psychemedics' testing of his two hair samples resulted in "a false positive," as his attorney asserted in his opening statement, because they were the result of unknowing ingestion of "cocaine derivatives" contained in medications that the Respondent was prescribed by his physicians, or because "maybe I ingested something" at ground zero or at the Staten Island landfill after September 11, 2001, when he was assigned to those locations.

I reject this affirmative defense because the Respondent offered no expert or medical testimony to establish even a reasonable possibility that his positive test results could have been caused by any of the medications he consumed, or by the "toxic" substances he alleged he had been exposed to at ground zero or at the Staten Island landfill, and because the testimony of the Department's expert, Cairns, refuted even the possibility that any of the medications that the Respondent was prescribed could have produced a positive LC/MS/MS test result for cocaine or for BE or for CE, much less the levels of cocaine, BE and CE detected in the Respondent's two hair samples. As a result, I find that the Respondent did not meet his burden of persuasion.⁵

I find it significant that the Respondent's hair samples tested positive for cocaine at the levels well above the reporting cut-off level. As noted above, Cairns testified that the analytical results show that when each of the Respondent's hair samples were separately tested via the LC/MS/MS "gold standard" test, the results showed that Sample 115606772 tested positive for cocaine at a concentration level more than seven times above the reporting cut-off level of five nanograms of cocaine per ten milligrams of hair,

⁵ Green v. Sielaff, 198 A.D. 2d 113 (1st Dept 1993).

and Sample LAN 410019119 tested positive for cocaine at a concentration level more than eight times above the cut-off level.

Moreover, the mere fact that Cairns acknowledged that it was unusual for a member of the service who has tested positive for drug use to have as extensive a medical history as the Respondent has, does not serve to negate, or even qualify, Cairns' expert testimony that none of the medications the Respondent was prescribed could have caused his hair samples to test positive for cocaine.

Also, although the Respondent's attorney argued that Cairns' answer in response to his question whether they had ever met before that "we have jousting before," indicates that Cairns was treating this trial as a game and that his testimony cannot be relied upon, I find that this single, flippant response during hours of testimony does not serve to negate Cairns' extensive (and humorless) testimony regarding the science of testing hair to determine drug content.

Finally, although two co-workers called by the Respondent testified that they had observed no signs of behavior consistent with cocaine use, I find their testimony has little probative value because their observations do not conclusively preclude occasional cocaine use by the Respondent when they were not around.

Based on this record, the only conclusion that can be reached is that the Respondent possessed cocaine without police necessity or authority to do so and that he ingested this cocaine by directly snorting, smoking or swallowing cocaine between November 7, 2007 and February 7, 2008.

The Respondent is found Guilty.

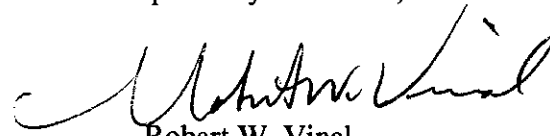
PENALTY

In order to determine an appropriate penalty, the Respondent's service record was examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222 (1974).

The Respondent was appointed to the Department on April 25, 1990. Information from his personnel folder that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The Respondent has violated the Department's rule against using illegal drugs. As a result, I am left with no alternative but to recommend that he be DISMISSED from the New York City Police Department.

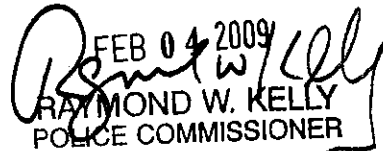
Respectfully submitted,



Robert W. Vinal

Assistant Deputy Commissioner - Trials

APPROVED



FEB 04 2009
RAYMOND W. KELLY
POLICE COMMISSIONER